BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA
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Order Instituting Rulemaking to Consider the Adoption of a General Order and Procedures to Implement the Digital Infrastructure and Video Competition Act of 2006.	))))	Rulemaking 06-10-005

COMMENTS OF VERIZON[1] ON PROPOSED DECISION OF COMMISSIONER CHONG RESOLVING ISSUES IN PHASE II

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September 13, 2007

[1] These comments are submitted on behalf of Verizon California Inc. in its capacity as holder of California Video Franchise Certificate Number 0001 dated March 8, 2007.

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Verizon respectfully submits these comments identifying errors of law and fact in the Proposed Decision of Commissioner Chong (PD) resolving issues in Phase II of this rulemaking. These comments are limited to the issue of whether additional video and broadband reporting is needed to enforce the Digital Infrastructure and Video Competition Act of 2006 (DIVCA).

INTRODUCTION

The PD's two new proposed reporting requirements should not be adopted. First, the PD's requirement to report the number of video customers ***by census tract*** is unnecessary and erroneous. General Order 169 already requires the submission of video subscribership data for a holder's video franchise ***as a whole***, and this aggregate number is more than adequate to enforce the relevant provisions of DIVCA. Requiring more granular data would violate DIVCA, constitute legal error, and expose new video entrants to the required submission of highly sensitive customer count data that their well-established competitors who dominate market share need not provide.

Second, the PD's attempt to uncover the manner in which customers use wireless broadband services is erroneous for several reasons. It exceeds the Commission's jurisdiction, and it also seeks essentially meaningless customer usage data which Verizon has no business reason to maintain in the requested format. Even if the information were provided, the plethora of wireless devices and the multiple uses to which they can be put make the proposed reporting requirement misrepresentative of actual usage patterns. Finally, imposing reporting obligations on wireless affiliates of video franchise holders is an incomplete, skewed, and anticompetitive means of gathering data, and no further

reporting requirements should be imposed. Should the Commission desire further information on wireless broadband usage, Verizon will be pleased to assist in crafting a more complete, voluntary, and informative way of gathering such data, for example through third party customer surveys or other similar means.

ARGUMENT

A. VIDEO SUBSCRIBERSHIP BY CENSUS TRACT IS NOT NEEDED FOR DIVCA ENFORCEMENT

In response to comments from the Division of Ratepayer Advocates (DRA), the PD requires franchise holders to report the number of video ***customers*** by census tract, in addition to the number of households ***offered*** video service by census tract.[2] The PD claims that such data will be "useful" for ensuring enforcement of the nondiscrimination and build-out provisions of §5890, and "necessary" to enable the Commission to assess the need for enforcement action on its own motion,[3] but fails to explain why. Nor did DRA offer any supporting rationale for its original proposal. In fact, such granular data is neither useful nor necessary; it is irrelevant. Although DIVCA requires census tract reporting of broadband subscribership, it does not do so for video subscribers, and a provision requiring such reporting was expressly removed from a prior version of the legislation before enactment, as detailed below. Therefore, the Commission cannot lawfully impose such a provision now.

Finally, aggregate video service subscriber data by franchise is already required by General Order 169. This existing report is precisely tailored to

[2] PD at 24. The version of the PD available on-line lacks page numbers beyond pages 1 and 2. For convenience, Verizon has continued that pagination throughout the remainder of the PD and uses those references in these comments.
[3] PD at 24, 25.

DIVCA's provisions, and will be more than adequate for the enforcement purposes mentioned in the PD.

1. DIVCA's Nondiscrimination and Build Requirements Are Defined Almost Exclusively in Terms of "Access" to Video Service, Not Subscribership

DIVCA's nondiscrimination provisions, and virtually all of its build-out provisions, are defined by whether a customer has ***access*** to video service, not whether the customer ***actually subscribes*** to that service. As to nondiscrimination, section 5890(a) provides that a franchise holder

> "may not discriminate against or deny ***access*** to service to any group of potential residential subscribers because of the income of the residents in the local area in which the group resides."[4]

"Access" is defined as the "***capability*** of providing service at the household address . . . ***regardless of whether any customer has ordered service***. . . ."[5] By DIVCA's plain language, then, video subscribership is irrelevant to section 5890's nondiscrimination obligations.

Similarly, DIVCA's build-out obligations are largely defined in terms of access. A franchise holder with more than one million telephone subscribers "shall provide ***access*** to its video services" to a specified percentage of households in its telephone serving area. Thus, Verizon must provide access to 25% of its telephone area within two years,[6] while AT&T must provide access to 35% of its telephone area within three years.[7] Here too, video service subscribership is not relevant.

[4] § 5890(a)(emphasis added).
[5] § 5890(j)(4)(emphasis added).
[6] § 5890(e)(1)(predominantly deploying fiber facilities to the customer premises).
[7] § 5890(e)(2)(*not* predominantly deploying fiber facilities to the customer premises).

2. General Order 169 Already Requires Franchise-Wide Subscribership Data, Which is More Than Adequate for Enforcement Purposes

Video "subscribership" has a very limited role in section 5890, and then only on a franchise-wide basis. First, section 5890(b)(3) requires free video service to one community center for every 10,000 video customers.[8] This customer count "trigger" contains no geographic limitations and therefore applies to the entire franchise area. Although neither this section nor any other provision of DIVCA imposes a video subscribership reporting requirement, the Commission adopted one in D.07-03-014 in relation to this community center obligation. Thus, General Order 169 ***already requires*** a state franchise holder to report annually the "number of video customers subscribing to" its video service on a franchise-wide basis.[9]

Second, section 5890(e) imposes greater build-out obligations if the companies reach a 30% subscriber threshold for video service. If "at least 30 percent of the ***households with access to the holder's video service*** subscribe to it for six consecutive months,"[10] Verizon must extend video access to 40% of its telephone service area (and AT&T to 50% of its telephone service area) within five years after it begins providing video service. If the 30% threshold is not met within three years of providing video service, the holder may submit validating information in support of a request for extension of time to meet the increased build obligations.[11] This increased build-out requirement is triggered by the required level of subscribers among "households with access to

[8] § 5890(b)(3).
[9] See General Order 169, § VII.D(2).
[10] § 5890(e)(3).
[11] § 5890(e)(4).

the holder's video service", i.e., subscribers within the franchise as a whole, not by census tract. Thus, the existing reporting requirement related to community centers adequately fulfills any enforcement purpose associated with this provision. This Commission has already ruled that it "will require production of new reports only if they are ***truly*** *necessary* for the enforcement of specific DIVCA provisions. . . ."[12] This more-granular report is plainly not necessary.

Finally, the Commission should be hesitant to impose competitively sensitive reporting requirements – particularly unnecessary ones – on franchise holders. Verizon began offering video service in its state franchise area just six months ago and, as the PD recognizes,[13] such granular subscribership data from a new market entrant is very competitively sensitive, as new entrants attempt to win customers from incumbent cable companies who currently enjoy dominant market share. For this reason, the state legislature amended DIVCA to remove such a requirement. DIVCA does not require such granular information, and it would add nothing to the Commission's enforcement powers. Such a requirement exceeds the Commission's authority under DIVCA and should not be required.[14]

3. Census Tract Reporting of Video Subscribers Was Eliminated From DIVCA Prior to Enactment and Cannot Be Reimposed

Yet another basis for removing this report exists. As explained above, census tract level subscribership reporting is not mentioned or required by DIVCA. A prior version of the bill did contain such a requirement, but it was removed prior to passage. As amended in the Senate August 23, 2006, the

[12] D.07-03-014 at 152 (emphasis added).
[13] PD at 25.
[14] See § 5840(a) (Commission may not "otherwise impose any requirement on any holder of a state franchise except as expressly provided in this division.").

penultimate version of AB2987 required reports including "[t]he number of households ***in each census tract*** that ***use*** video service provided by the holder or its affiliates."[15] This plainly called for the number of video subscribers by census tract. However, less than a week later, AB2897 was amended into its final form, and the quoted language was removed.[16] Notably, that later final version requires both availability ***and*** subscribership data to be reported for broadband service, but ***only*** availability must be reported for video service, ***not*** subscribership.[17] The latter's absence is conclusive – the legislature did not intend to require census tract level reporting for video subscribership.

Fundamental principles of California statutory construction dictate that a provision removed from an earlier version of a statute cannot be read into the final one. "The rejection by the Legislature of a specific provision contained in an act as originally introduced is ***most persuasive*** to the conclusion that the act should not be construed to include the omitted provision."[18] United States Supreme Court precedent is in accord.[19] Accordingly, this Commission is not free to reimpose video subscriber reporting by census tract.

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[15] See AB2987 as amended in Senate August 23, 2006, p. 15, § 5840(n)(1)(F), available at http://info.sen.ca.gov/pub/05-06/bill/asm/ab_2951-3000/ab_2987_bill_20060823_amended_sen.pdf.

[16] See AB2987 as amended in Senate August 28, 2006, p. 19, (text of § 5840(n)(1)(F) stricken as deleted), and pp.41-42 (§ 5960(b)(1) and (2) added), available at http://info.sen.ca.gov/pub/05-06/bill/asm/ab_2951-3000/ab_2987_bill_20060828_amended_sen.pdf.

[17] *Compare* § 5960(b)(1)(B)(census tract data required for the "number of households that ***subscribe*** to broadband" in the state) with § 5960(b)(2)(A)(ii)(census tract data required for the "number of households in the holder's telephone service area that ***are offered*** video service").

[18] *Rich v. State Board of Optometry,* 235 Cal. App. 2d 591, 607, 45 Cal. Rptr. 512 (1965) (emphasis added). See also 7 Witkin Summ. Cal. Law, Const. Law § 125 (omissions from bills), citing *Beverly v. Anderson* (1999) 76 C.A.4th 480, 485, 90 C.R.2d 545 (fact that Legislature omitted provision from final version of statute is strong evidence that it did not intend provision to be judicially grafted onto statute); *see also California Mfrs. Assn. v. Public Utilities Com.* (1979) 24 Cal. 3d 836, 845-846 [157 Cal. Rptr. 676, 598 P.2d 836].) (accord).

[19] *See, e.g., Daily Income Fund v. Fox*, 464 U.S. 523, 539 (1984); *Doe v. Chao*, 540 U.S. 614, 623 (2004). *See* discussion in Verizon's Opening Comments on Proposed Decision of Commissioner Chong, filed February 5, 2007 at 6-7. Such unsupported reporting obligations

B. THE PROPOSED REPORTING OF WIRELESS BROADBAND DEVICE DATA IS MEANINGLESS, AND THEREFORE UNREASONABLY BURDENSOME

The PD's proposed reporting requirement on how customers use wireless broadband services is inappropriate for several reasons. First, as wireless broadband service is an interstate service, the Commission lacks jurisdiction to compel production of data relating to that service. But more to the point, the data sought by the PD is essentially meaningless. If the Commission wants data about customer adoption of wireless broadband to inform its rural broadband infrastructure policies, better means of obtaining it exist, and Verizon will gladly offer its assistance in assessing other options.

1. The Commission Lacks Jurisdiction Over Wireless Broadband Service

As an initial matter, the Commission's effort to obtain wireless broadband data exceeds its jurisdiction. In March 2007, the Federal Communications Commission (FCC) declared wireless broadband Internet access services to be information services that are jurisdictionally interstate. *Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks,* FCC 07-30, ¶ 28, 21 FCC Rcd 5901, 5911 (released Mar. 23, 2007). Based on the FCC's order, there is no jurisdictionally intrastate wireless broadband service, and thus the Commission lacks jurisdiction to compel reporting concerning the detail and extent of those services.[20]

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should not be expanded, particularly since they present an incomplete, skewed data set in a manner that burdens only a few market participants.

[20] Verizon also maintains that the PD's imposition of reporting requirements on franchise holders' wireless affiliates violates DIVCA. See discussion in Verizon's Opening Comments on Proposed Decision of Commissioner Chong, filed February 5, 2007 at 3-9. However, these arguments were rejected in D.07-03-014 and will not be reiterated here.

For the reasons explained below, Verizon does not prepare reports in the ordinary course of business on broadband access in the requested formats, either by census tract or by customer equipment in use. Since the Commission lacks jurisdiction to regulate wireless broadband services, it cannot and should not mandate how subscriber data pertaining to that service is formatted or maintained.

In any event, as Verizon has explained previously,[21] customer-specific data regarding wireless broadband service provides no reliable information about either the use or availability of service at the customer location, since customers may use the service when traveling even though they cannot access the service at their billing address. Geographic availability is the only potentially relevant point of interest, and Verizon has already agreed to provide a coverage map to the Commission showing where broadband access is available in California, subject to confidentiality protection, as provided in General Order 169 VII. C.1 (Reporting Requirements).

2. Wireless Broadband Devices Are Increasingly Fungible And Provide No Useful Information About How Service Is Used

The PD seeks information about the degree to which customers use wireless broadband to satisfy their on-line needs, and therefore requires subscriber data to indicate "whether the subscription is for a data-enabled wireless phone, PDA or other wireless hand-held device, or . . . a wireless data card."[22] This proposal to report usage by the type of mobile device draws a distinction that does not exist in reality.

[21] *See* discussion in Verizon's Opening Comments on Proposed Decision of Commissioner Chong, filed February 5, 2007 at 8-9.
[22] PD at 23.

Verizon's wireless broadband access service provides users with the opportunity to use various functions and devices. Subscribers are not tracked or categorized by how they use the service, so the underlying purpose of the information the PD seeks would not be evident in any report indicating what device(s) has been purchased. Even if such a report were provided, it would reflect a meaningless distinction. PDAs and other handheld devices equipped with web browsers use the same broadband access service as laptops with aircards, and are charged at essentially the same rates. Moreover, handheld devices with wireless capability can act as modems when they are "tethered" via cable to a laptop or desktop computer without wireless capability, and can provide the same functionality as an aircard. Subscribers can also use an aircard with a wireless router to provide WAN functionality for multiple devices, e.g., for meter reading in any area served by broadband access.

Data from a recent Pew Research Center study illustrates these points well.[23] The Pew study reported on wireless usage by type of device, and revealed the following:

Laptop computers: 39% of internet users have laptops, 80% of which have wireless capability. Of those laptop users,

- 88% have logged onto a home wireless network
- 57% have used a wireless network other than home or work
- 36% have logged onto a work wireless network

Cell phones: 25% of internet users have a cell phone with wireless internet access. Of those cell phone users,

- 54% have accessed the internet using their cell phones
- 47% have done so away from home or work

[23] Pew Research Center Publications; Horrigan, "The World of Wireless Widens" (February 26, 2007), available at http://pewresearch.org/pubs/417/the-world-of-wireless-widens.

- 28% have done so at work
- 27% have done so at home

PDAs: 13% of internet users have a PDA with wireless internet access. Of those PDA users,

- 82% have accessed the internet using their PDA
- 56% have done so away from home or work
- 49% have done so at home
- 38% have done so at work

This data confirms that the equipment distinction that the PD proposes to make gives no useful indication as to how broadband service is provisioned and used, and therefore would not accurately represent usage by subscribers.

Finally, of course, by requiring data from only two wireless providers – AT&T and Verizon – the Commission fails to address the wide range of providers using a variety of mobile, portable, or fixed technologies, including wireless LANs.[24] As the FCC has noted,

> Wireless broadband technologies and the business models for their deployment continue to evolve at a raid pace. There have been significant technical advances and more are anticipated over the next few years.[25]

Given this, the Commission should consider other alternatives to obtain more meaningful customer usage data. For example, a customer survey would more directly obtain the kind of information the Commission seeks. Alternatively, third party information may be readily available or could be commissioned, such as the Pew Research study described above. Verizon is willing to discuss this and other voluntary options for reaching the goal the PD espouses.

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[24] *See* discussion of different wireless broadband technologies in *Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks,* FCC 07-30, ¶¶ 11-15, 21 FCC Rcd 5901, 5911 (released Mar. 23, 2007).

[25] Id. at ¶ 17.

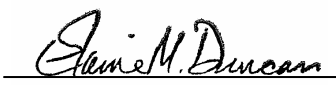
CONCLUSION

For the reasons set forth above, the PD should be changed to eliminate two reporting requirements. First, the requirement to report the number of video customers by census tract is unnecessary and unlawful, and the existing report of video subscribers on a franchise basis will fulfill the Commission's enforcement goals. Second, the requirement to report customer usage of wireless broadband services by type of device seeks meaningless data, and exceeds the Commission's jurisdiction.

Suggested modifications to the proposed Findings of Fact and Conclusions of Law reflecting these recommendations are attached as Appendix A to these comments.

Dated: September 13, 2007

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

I hereby certify that: I am over the age of eighteen years and not a party to the within entitled action; my business address is 112 Lakeview Canyon Road, Thousand Oaks, CA 91362; I have this day served a copy of the foregoing:

COMMENTS OF VERIZON ON PROPOSED DECISION OF COMMISSIONER CHONG RESOLVING ISSUES IN PHASE II

by electronic mail to those parties on the service list shown below who have supplied an e-mail address, and by U.S. mail to all other parties on the service list.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 13th day of September, 2007, at Thousand Oaks, California.

/s/Jacque Lopez
JACQUE LOPEZ

Service List:
Rulemaking 06-10-005

APPENDIX A

Proposed Modifications to Findings of Fact and Conclusions of Law

Findings of Fact

~~4. Reporting of customers' means of access to wireless broadband will further the legislative intent to monitor the penetration of broadband services, especially to unserved or underserved areas within the State.~~

~~5. Reporting by a state video franchise holder of the number of its video customers by census tract, in addition to the number of households that are offered video service, will provide necessary information to the Commission in enforcing the non-discrimination requirements of Pub. Util. Code § 5890(a).~~

Conclusions of Law

7. The Commission has authority to take actions necessary to carry out its duties under DIVCA. No additional reporting requirements are needed at this time.~~, and to that end the Commission may impose additional reporting requirements beyond those set forth in DIVCA.~~

CALIFORNIA PUBLIC UTILITIES COMMISSION
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Proceeding: R0610005 - CPUC - CABLE TELEVIS
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